formulations

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Foundation Business: A Report From the Office

• As of late March we have not yet received any word from the IRS regarding the status of our application for 501(c)(3) tax status.

• In late February we mailed 240 copies of issue no. 2 of *Formulations*. The mailing list combines several sources including: libertarian contacts here in North Carolina; names gleaned from publications of national libertarian organizations and think-tanks; and members and friends.

• Since publication of issue no. 2, we have been joined by five new members. On the way to our first million members, we have reached the milestone at 0.002%.

• We also received two membership renewals. This has reminded us that we need to start a system of telling members when their memberships expire. Until we do, members may be assured that no memberships expire till August 1994, since the first memberships started in August 1993. Your memberships will run a full calendar year for each $30 which you apply toward membership. But be assured that we welcome additional contributions.

• In February we prepared and mailed our first annual report. This document, modeled roughly on anual reports of business corporations, gives a summary of organization, programs, and finances of the Foundation. One of the financial statements, Sources and Uses of Funds, shows that the Foundation spent $1233 from June 7, 1993, the date of incorporation, to December 31, 1993, the end of the first fiscal year. The largest expenditures were printing, $445, and hotel charges for the October forum, $177. The largest sources of funds were $703 from Richard Hammer, and $390 from memberships.

• Also in February we printed and mailed the proceedings of our October 1993 forum on constitutions. △

Forum on Systems of Law to be held April 30

The Free Nation Foundation will hold its second Forum on Saturday, April 30, 1994, at the Days Inn near the Raleigh-Durham Airport, NC (Interstate 40, exit 284; location shown below). The Forum will run from 10 a.m. until 5 p.m. The subject will be Systems of Law.

I-40 at Exit 284

On the Agenda:

Basic Questions About Law
presented by
Richard Hammer

Development of Law as Society Develops
presented by
Bobby Emory

Implementing Private Law in a World of States
presented by
Roderick Long

To register for the Forum, return the enclosed card. Registrants will receive a package of materials, lunch, and proceedings printed after the Forum. Registration fee: for nonmembers, $25 until April 22, $35 thereafter; for members of the Free Nation Foundation, $20 until April 22, $28 thereafter. Those planning to stay at the hotel should call 919-469-8688 for reservations. △

FNF Director Lectures on Liberty

Since the founding of the Free Nation Foundation last year, Director Roderick Long has been giving a variety of lectures and talks on libertarian topics across the country. Last July 16, he lectured on "The Ethics of Flourishing: Aristotle vs. Rand" at the Institute for Objectivist Studies Summer Seminar in Philosophy at Roger Williams College, Bristol, Rhode Island. Dr. Long offered some criticisms of the defense of individual rights offered by libertarian philosopher-novelist Ayn Rand, and suggested that a more successful defense might in-

(continued on page 11)

Inside

Government Grows: True or False?
by Richard Hammer 2

Law Can Be Private
by Richard Hammer 3

The Decline and Fall of Private Law in Iceland
by Roderick Long 4

Notes on the History of Legal Systems
by Bobby Emory 7

Restitutive Justice and the Costs of Restraint
by Richard Hammer and Roderick Long 9

The Nature of Law
by Roderick Long 10

A University Built by the Invisible Hand
by Roderick Long 12

Government Grows: True or False?

by Richard Hammer

We in the Free Nation Foundation would like to build toward a free society. To advance this effort, it seems wise for us to study history, to see if history has parallels, something to teach us. I am not a historian. But I will tell some of what I have learned, and speculate about what that means for us. I hope that readers who know more will contribute to our education by writing in their corrections and additions.

A Thesis: Government Grows

I would like to confirm or refute this thesis:

> Existing governments grow, almost always. This growth eventually cripples the economy. If governments are not first destroyed by foreign invasion, then they weaken economically (and morally) till they collapse or are overthrown from within.
>
> While history may show some instances of the dismantling of powers within existing states, these instances are infrequent and insubstantial when compared to the overwhelming trend of growth. This applies not only to modern democracies, but also to earlier monarchies, and, I suggest, to all states in history.

The thesis has a corollary which suggests where we might expect to find liberty:

> Liberty has existed in the times and places where government has not yet grown. After a government collapses or is overthrown, there will be pockets of liberty till government grows over them again.

Little has Been Written to Help Answer the Question

Unfortunately, few historians have studied history as I would like to see it, through a lens which highlights issues of economic liberty and productivity. I will share here the few tidbits I have picked up.

In *Our Enemy the State,* Albert Jay Nock presents a similar thesis: that governments, once they grow to a certain size, then con-

(continued on page 3)

formulations

Editor: Roderick T. Long

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Statement of Purpose

The purpose of the Free Nation Foundation is to advance the day when coercive institutions of government can be replaced by voluntary institutions of civil mutual consent, by developing clear and believable descriptions of those voluntary institutions, and by building a community of people who share confidence in these descriptions.

Board of Directors

Richard O. Hammer, President
Bobby Yates Emory, Secretary
Roderick T. Long

Formulations is published quarterly, on the first of March, June, September, and December.

Subscriptions to *Formulations* may be purchased for $10 for four issues (one year). Membership in the Free Nation Foundation may be purchased for $30 per year. Members receive: a subscription to *Formulations,* 20% discount on conference registration fees, invitation to attend regular meetings of the Board of Directors, copies of the Bylaws and Annual Report. Additional contributions are welcome.

An application has been filed with the IRS for 501(c)(3) tax-exempt status.

Information for Authors

We seek columns, articles, and art, within the range of our work plan. We also welcome letters to the editor which contribute to our debate and process of self-education.

Our work plan is to work within the community of people who already think of themselves as libertarian, to develop clear and believable descriptions of the critical institutions (such as those that provide security, both domestic and national) with which we libertarians would propose to replace the coercive institutions of government.

As a first priority we seek formulations on the nature of these institutions. These formulations could well be historical accounts of institutions that served in earlier societies, or accounts of present institutions now serving in other societies.

As a second priority we seek material of general interest to libertarians, subject to this caveat: We are not complaining, we are building. We do not seek criticism of existing political institutions or persons unless the author uses that criticism to enlighten formulation of an improved institution.

All submissions are subject to editing.

Submissions will be considered for publication if received by the 15th of the month preceding month of publication. Thus, the deadlines for writers are: February 15, May 15, August 15, and November 15.

Address correspondence to: Free Nation Foundation, [outdated street address], Hillsborough NC 27278.

Law Can Be Private

by Richard Hammer

After the FNF Board of Directors decide the subject for our second forum, systems o law, it became evident that I needed to lear something if I hoped to contribute. Accord ingly, the President of FNF assigned me th task of reading *The Enterprise of Law*, b Bruce L. Benson. I never would have un dertaken this assignment without som prodding. But, having completed it, I ca say that I feel grateful. Would you like t feel grateful too? Okay, here is your as signment. Read this book.[1]

Before reading *The Enterprise of Law* question lingered in my mind: could law indeed be private? The book pretty much answered that in the affirmative. Benson convinced me with examples and stories. So I find myself back at the drawing board asking, now what is the question? Private law sounds better to me than the government stuff. I want it. What can we in the Free Nation Foundation do to move toward it?

We could say that the FNF work plan calls for us to describe the specifics of a system of law under which we libertarians would be happy to live. And surely that is worth undertaking. But before going far down that path I want to understand better the animal we would tame. Law is a living and moving thing — with teeth.

Realizing now, as I did before the first FNF forum, that I am better equipped to ask questions than to answer them, I will plan to structure my part in our upcoming forum around some questions. I will ask the questions, give my tentative answers, and then ask for others to suggest their answers.

My questions are:

1) How big is law? To adequately describe it would we need ten words, ten pages, ten volumes, or ten lifetimes?

2) What aspect of human nature or human culture drives government law to supplant voluntary legal systems, as it has done throughout much of the world in recent history? (This question is borrowed from correspondence of Bruce Benson.)

3) Assuming we get the correct answer to question 2, is this drive reversible?

4) Assume we found ourselves empowered to dismantle a system of government law. Assume for instance that we had purchased from the citizens of a small country their consent to implement our constitution. How would we dismantle the government system of law? In what sequence? What problems could we expect to encounter?

Richard Hammer

I realize that I have not brought a doubting reader along to share my confidence that law can be private and voluntary rather than "public" and run by the government. I imagine that such confidence is built with experience or with stories filled with believable details. I hope that for future issues of *Formulations* our readers will submit accounts which help carry this point.

For me, Chapter 2 of *The Enterprise of Law* provided sufficient data to make a convert. Here I give one excerpt. In it Benson is recounting research, done by Leopold Popisil in the 1950's, of the stateless Kapauku Papuans, a primitive linguistic group of about 45,000 people living by horticulture in West New Guinea.

> "Recognition of law was based on kinship and contractual reciprocities motivated by the benefits of individual rights and private property. Indeed, a 'mental codification of abstract rules' existed, so that legal decisions were part of a 'going order.' Grammatical phrases or references to specific customs, precedents, or rules were present in all adjudication decisions that Popisil observed. He concluded: 'not only does a legal decision solve a specific case, but it also formulates an ideal — a solution intended to be utilized in a similar situation in the future. The ideal component binds all other members of the group who did not participate in the case under consideration. The [adjudicator] himself turns to his previous decisions for consistency. In a way, they also bind him. Lawyers speak in such a case about the binding force of precedent.'"
> (*The Enterprise of Law*, p. 17.) Δ

[1] Bruce L. Benson's *The Enterprise of Law: Justice Without the State*, published in 1990 by the Pacific Research Institute for Public Policy, may be purchased from Freedom's Forum Bookstore in San Francisco, 415-864-0952. As of press time, Freedom's Forum is offering a hardcover copy for a sale price of $14.95 plus shipping, though the price will probably go up soon.

Richard O. Hammer, founder of the Free Nation Foundation, owns a small business building houses in Hillsborough, North Carolina. On a local level he writes frequent columns, interpreting political events in a libertarian frame. He participates in the Republican Party and currently is candidate for County Commissioner in Orange County, NC. In the past he worked as an engineer and management scientist.

Government Grows (from p. 2)

tinue to grow till they collapse. But as I recall, he does not offer much background for this, and does not speculate about the causes.

One book, *The God of the Machine* by Isabel Paterson, does address the theme. She writes, for instance, about the Roman Empire, and correlates, for different periods in its life, the strength of its economy with the freedom of its markets. During the heyday there was great freedom. During the collapse a huge bureaucracy was trying to fix the economy by strengthening its regulation. But I need to read this book again. Paterson makes her points about political economy by writing analogies to machines (dynamos, engines, generators), and unfortunately I did not always get her points.

References in *The God of the Machine* led me to the work of Lord Acton. This English historian and political thinker (1834-1902) often spoke of his dream to write a book called *The History of Liberty*. And while Acton never wrote this book, he did leave many lectures and papers. One Liberty Fund volume tantalized me with its title

(continued on page 4)

Government Grows (from p. 3)

Essays in the History of Liberty: Selected Writings of Lord Acton. But unfortunately Acton did not focus on economic liberty, and my exploratory reading leaves me doubting that further reading of his work would answer my present questions.

My thesis that government grows resolutely is supported by the satire of C. Northcote Parkinson. For instance in his book *The Law* (1980), Parkinson concludes that bureaucratic staffs grow new positions at an annual rate of 5.75%. And this increase continues independent of the amount of work (if any) done by the department in question.

It Is Hard To Find Evidence

Does the history exist which will prove or disprove my thesis? Such history may be difficult to discover because the records that we have are almost all about acts of governments, and not about acts of private persons or organizations. Bruce Benson, economist at Florida State University, while trying to gather evidence about the nature and maintenance of roads in mediæval England, found virtually no records of the private practices which must have existed early in the period. But the state left records, as gradually over the span of centuries it took over aspects of road maintenance. Governments, Benson notes, are better about leaving records than private interests.

So liberty, the stuff in history which we libertarians would like to document, seems to be unrecorded as such. The times and places in history where liberty existed may be those for which we have the least records.

What To Do

Suppose this thesis, that government grows, is true. What does that mean for us libertarian activists? Well, for starters, we should keep our heads cool as we perceive the glacier inching toward us; we can know that we are not the first ones to be in this crunch. The thesis suggests that this fight in which we find ourselves embroiled has been going on since the birth of the state.[1]

And seeing it this way, it may be possible for us to direct our anger more usefully. During the course of my fight against the state, I have been angry with a number of different people and institutions. First I was angry with the agents of the state who carried out the orders of the state. But, thinking about it, I can see these people as relatively innocent, just doing their jobs, and they did not create their jobs. Then for a time I was angry with the politicians. But, thinking about it, politicians did not elect themselves. So in recent years my anger has been directed at the statists all around me who did elect these politicians. But I also need to grow beyond this, because these people also are innocent — they are just reflexively using a tool which on the surface appears capable of helping them.

The work plan of the Free Nation Foundation is an attempt to do something rational about the glacier inching toward us. If the corollary to my thesis is correct, then we can be confident that history will continue to produce pockets of liberty. The challenge for us libertarians is this: can we help one of those pockets get created? Let's try. Join us. △

[1] For an eye opening account of the birth of the state, see *The State*, by Franz Oppenheimer.

The Decline and Fall of Private Law in Iceland

by Roderick T. Long

History is philosophy teaching by examples.
— Bolingbroke

Many libertarians are familiar with the system of private law that prevailed in Iceland during the Free Commonwealth period (930-1262). Market mechanisms, rather than a governmental monopoly of power, provided the incentives to cooperate and maintain order.

In outline, the system's main features were these: Legislative power was vested in the General Assembly (*althingi*); the legislators were Chieftains (*godhar*; singular, *godhi*) representing their Assemblymen (*thingmenn*; singular, *thingmadhr*). Every Icelander was attached to a Chieftain, either directly, by being an Assemblyman, or indirectly, by belonging to a household headed by an Assemblyman. A Chieftaincy (*godhordh*) was private property, which could be bought and sold. Representation was determined by choice rather than by place of residence; an Assemblyman could transfer his allegiance (and attendant fees) at will from one Chieftain to another without moving to a new district. Hence competition among Chieftains served to keep them in line.

The General Assembly passed laws, but had no executive authority; law enforcement was up to the individual, with the help of his friends, family, and Chieftain. Disputes were resolved either through private arbitration or through the court system administered by the General Assembly. Wrongdoers were required to pay financial restitution to their victims; those who refused were denied all legal protection in the future (and thus, *e.g.*, could be killed with impunity). The claim to such compensation was itself a marketable commodity; a person too weak to enforce his claim could sell it to someone more powerful. This served to prevent the powerful from preying on the weak. Foreigners were scandalized by this "land without a king"; but Iceland's system appears to have kept the peace at least as well as those of its monarchical neighbors.

The success of the Icelandic Free Commonwealth's quasi-anarchistic legal institutions has been used by David Friedman, Bruce Benson, and others as evidence against the Hobbesian argument that cooperation is impossible in the absence of central authority.

But during the Sturlung Period (1230-1262), the Icelandic Free Commonwealth did eventually collapse into violent conflict and social chaos, and the King of Norway had to be called in to restore order. Doesn't this show that Hobbes was right after all?

Not necessarily. There is another possible interpretation.

In the year 1000, seventy years after the founding of the Free Commonwealth, Iceland was officially converted to Christianity, thus putting an end to a tradition of relative religious freedom. Before that time, most Icelanders worshipped the pagan Norse gods, but there were a few Christians. If you were a Christian you were required, along with your pagan neighbors, to pay a temple fee to maintain the temple of your chosen Chieftain, but otherwise you could worship more or less as you pleased.

But in the 990's, King Olaf I of Norway sent groups of militant Christian missionaries to proselytize through harassment and intimidation techniques. Those who resisted the word of God were sometimes beaten or killed. Moreover, the King captured and held as hostages the relatives of prominent Icelanders visiting Norway; Olaf threatened to maim or kill these hostages

(continued on page 5)

Private Law in Iceland (from p. 4)

unless Christianity was declared Iceland's official religion.

Iceland, a resource-poor country without an army, and for whom the powerful and wealthy Norway was an indispensable trading partner, had to take the King's threats seriously. Even so, many Icelanders resisted, refusing to abandon their pagan beliefs. The island swiftly became divided into hostile opposing factions of Christians and pagans. A bloody civil war seemed imminent.

But this catastrophe was averted in typical Icelandic fashion: the dispute was submitted to arbitration. Just as, to the composers of the Icelandic Sagas, it seemed natural, when telling of a haunted house, to depict the protagonists as holding a trial on the spot and trying the ghosts for trespassing, and likewise to portray the ghosts as accepting the verdict and peacefully departing, so it seemed equally natural to the religious disputants, whose entire social system was based on conflict avoidance through voluntary arbitration, to set the matter before a respected member of the community — someone acceptable to both sides — and agree to accept his decision as binding.

The choice fell on Thrageirr Thorkelsson, a prominent pagan Chieftain with strong ties to the Christian camp. Thorkelsson decided in favor of the Christians, and so Christianity became the compulsory religion for all Icelanders. (This is a striking example of the respect for arbitration that often characterises cultures with systems of private or polycentric law; it's difficult to imagine a similar settlement being as successful today in the case of Ireland, Bosnia, South Africa, or Palestine.)

The end of religious pluralism in Iceland in the year 1000 bore fruit nearly a century later in 1097, when the compulsory Christian tithe was instituted. This fee, which all householders were required to pay, was divided into four parts. The first was for your bishop. (Iceland had two, one for the Northern Quarter and one for the other three Quarters.) The second was for your local priest. The third part went for the purpose of welfare relief; this portion, at the demand of the farmers, was collected and administered by the Cooperatives (*hreppar*; singular, *hreppr*), *i.e.*, self-governing mutual-aid associations of independent householders; so local control was preserved in this instance. But the fourth and most important portion — the Churchstead fee — went for the maintenance and upkeep of church buildings. It was this last, innocent-sounding portion of the tithe that did most to undermine the Icelandic legal system.

All the good land in Iceland had more or less been claimed and occupied in the first century of settlement, and the Church as yet lacked the power to wrest any land away from its individual owners. Thus in Iceland, Christian churches were built not on church property but on private land; such tracts of land were called Churchsteads (*stadhir*; singular, *stadhr*). The money raised by the tithe to maintain property located on a Churchstead went to the private owner of that Churchstead. Thus, owning a Churchstead was a source of guaranteed income.

Fees to support Chieftains were compulsory too, of course; but the person paying the fee was free to determine its recipient. The following of a particular Chieftain was after all determined not by territorial sovereignty but by mutual consent; if your Chieftain were inclined to abuse his power or to neglect his obligations toward you, you could transfer your allegiance to a rival Chieftain without having to move from the district. This element of competition, remember, was what served to keep the ambition of the Chieftains in check.

Those paying the tithe, however, had no choice about which Churchsteads their money would go to; that was decided by the bishops. In other words, those who owned Churchsteads — generally Chieftains who had become Christian priests — got the money no matter what they did, and thus did not have to depend for their income on the good will of their clients. Hence the Churchstead fee, unlike the regular Chieftain fee, lacked the crucial element of accountability.

Moreover, the Churchstead fee, again unlike the Chieftain fee, was based on an assessment of the payer's property; this allowed for graduated taxation and the possibility of soaking the rich. Well, *some* of the rich. For of course those among the rich who were also Chieftains were exempted from having the value of their Chieftaincy taxed. Since a Chieftaincy was, directly and indirectly, the chief source of income for a Chieftain, this was very convenient for the Chieftains, who pushed the tithe law through the General Assembly (which by some strange coincidence consisted entirely of Chieftains!) under the pretext of public support for Christianity, a religion that Icelanders unsurprisingly revered after ninety-seven years of compulsory Christian indoctrination.

The original Chieftains were pagan priests; becoming Christian priests did not involve a major change in lifestyle for them. Under Icelandic law, despite the futile protests of their nominal superior the Norwegian archbishop, priests could take part in lawsuits and bloodfeuds. More importantly for present purposes, they could marry and have children. Hence, when a Chieftain-Priest who owned a Churchstead died, the right to receive the Churchstead fee would pass to his children rather than reverting to the Church. Since recipients of Churchstead fees did not have to compete for the good will of their clients, those families that owned Churchsteads were able to accumulate wealth and power without the traditional restraint of the market.

Over time, wealth and power began accordingly to be concentrated in the hands of a few families, as those who owned Churchsteads used their new income to buy up, or enable relatives to buy up, Chieftaincies belonging to other Chieftains. By the time of the Sturlung Period, this had led to the emergence of a privileged elite called *storgodhar* ("Big" Chieftains). Since the total number of Chieftaincies was fixed by law, competition among Chieftains became less effective as more and more Chieftaincies passed into the hands of *storgodhar* families. Less competition meant that Chieftains could charge arbitrarily high prices for their services, often forcing their Assemblymen into the role of propertyless dependents. The seeds of territorial sovereignty were sown as many Chieftains began to acquire exclusive monopoly control over their districts. The Free Commonwealth was beginning to succumb to an alien disease common throughout Europe but hitherto unknown in Iceland — *feudalism*.

In the absence of the earlier competitive check on abuse of power, the *storgodhar* grew so powerful during the Sturlung Period that they became able, for the first time in Iceland's history, to impose general taxation whose revenues went directly to support the governing elite, without the disguise of supporting Christianity. Moreover, now

(continued on page 6)

Private Law in Iceland (from p. 5)

that ownership of Churchsteads had become the road to political power, contests over Churchsteads were more important than traditional contests over ordinary sorts of property; more people's interests were involved, conflict was more likely, and disputes once settled through arbitration were now settled on the battlefield.

In 1000, Iceland's unique institutions of voluntary coordination had averted civil war. But those institutions, and the market incentives that had served to maintain them, had now been undermined. Iceland saw its first full-scale battles as power struggles among the elite families and their respective supporters erupted across the land. This was the Sturlung Period (1230-1262), named after one of the most important *storgodhar* families.

Norwegian influence served to exacerbate the conflict. The King of Norway had always been lurking in the background, and now it was understandably tempting to each of the various competing parties to attempt to enlist him on their side. These shifting alliances and power plays further destabilized the Icelandic situation, as King Haakon of Norway eagerly encouraged conflict, dissension, mistrust, and confusion.

Finally, in 1262, King Haakon graciously offered to come in and quell the conflict he had helped to create. A desperate Iceland, ravaged by civil war, accepted his offer, and submitted to Norwegian rule. The Icelandic Free Commonwealth, founded 332 years earlier by refugees from the tyranny of Norway's first monarch, Harald Fairhair, fell at last under the yoke of a Norwegian King.

MORAL:

The Icelandic Free Commonwealth's downfall was not that it was too anarchistic, but rather that it was not anarchistic enough!

Suppose Iceland had maintained competition in religion the way it had competition in law. Or again, suppose Iceland had continued to rely solely on voluntary support for religion rather than making the tithe mandatory. In either case, the owners of Churchsteads would not have had an automatic guarantee of income, and so could not have accumulated wealth and power without being subject to competition and accountable to their clients.

Moreover, if the upper limit on the total number of Chieftaincies had not been fixed by law, new Chieftains would have been able to arise and challenge the emerging ruling class. The ruling families' strategy of buying up all the Chieftaincies would have failed, because it would not have decreased the potential number of independent Chieftains; hence competition would not have been undermined. If, for example, a Cooperative had been able to start up its own Chieftaincy, its members banding together for mutual aid and acting jointly as a kind of corporate Chieftain, the power of the *storgodhar* would have been severely undercut. Local control and accountability would have been strengthened, and the centralizing of power reversed. For that matter, if the supply of Chieftaincies had not been regulated by the legislature — or if there had been competing legislatures — it would have been much harder to institute the tithe law in the first place. Instead, the legal cap on Chieftaincies artificially restricted the supply of political power, while the tithe law artificially subsidized the demand for such power; a centralization of power in a few hands was the inevitable result. The instability of the Icelandic Free Commonwealth lay not in its anarchistic, polycentric features but in its governmental, monocentric features.

Foreign monocentrism also contributed to the Free Commonwealth's demise. If *Norway* had had a private or polycentric legal system, there would have been no King Olaf in 1000 to intimidate Iceland out of religious freedom, and no King Haakon in 1262 to encourage conflict and exploit its consequences. The problem of foreign states and the threat they pose is one of the most important ones for theorists of private law to discuss and resolve.

Yet despite the incipient monocentrism at home and the monocentric Norwegian threat next door, Iceland's polycentric legal system was so stable that the seeds of corruption took a remarkably long time to bloom: from the forcible conversion at the end of the tenth century, to the compulsory tithe at the end of the eleventh century, to the final collapse in the mid-thirteenth century. Is *this* the instability of anarchy portrayed by Hobbesians?

Moreover, as David Friedman has pointed out, examination of the historical evidence indicates that the murder rate in Iceland during the Sturlung Period — the era that Icelanders regarded as so intolerably violent as to justify abandoning their political system — was about the same as the murder rate in the United States today! Pre-Sturlung Iceland must thus have been even *less* violent than our own society.

Iceland's quasi-anarchistic system broke down only in the last thirty years of its existence, having worked successfully for three hundred years before that. We should be cautious in labeling as a failure a political experiment that flourished longer than the United States has even existed. Δ

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Notes on the History of Legal Systems

by Bobby Yates Emory

Introduction

If we are to live with others, we must have a way to resolve the inevitable disputes. Perhaps we also need to have a code to provide a framework for our relations with others. We need to be able to create contracts that are enforceable over long time periods. So if we are to design the institutions for a free society, we must include a legal system in our deliberations.

Although our primary purpose is to create proposals for the future, we may get some ideas or, at least, some inspiration, from studying the history of legal systems. Perhaps we can avoid some of the mistakes that have already been made.

Philosophical Foundations

Since the legal system will be one of the few areas where we will allow the use of compulsion, we must be very careful to select a system that will not violate our philosophy. A legal system is certainly a "useful servant but a fearful master." This study will not comment on the philosophy appropriate to the legal systems discussed. Suffice it to say that most of them are more appropriate to statism than to freedom.

The Evolution of Law

If we look back at the history of law in many societies, we can discern the same evolution taking place in the same sequence.

- First, people live in family units with rule by the patriarch.
- Second, a patriarchal sovereign, who is usually heroic, issues rulings in individual cases after the fact.
- Third, customs grow up from the sovereign's rulings.
- Fourth, a code is created. This code bears on relationships between families or between the patriarchs of the families.
- Fifth, the code begins to bear on individuals rather than families.
- Sixth, more relationships are defined by contracts, *i.e.*, "a movement from Status to Contract."[1]

Accustomed as we are to legal systems with voluminous codes and well defined procedures for contracts, many of these don't sound like much of a legal system to our ears. But for most of the existence of humans,

Bobby Emory

these are the systems they lived under.

The Patriarch

In the earliest records and in the observations of more primitive cultures by more advanced, the earliest stage of development is characterized by people living in small groups based on kinship and ruled by the eldest male. Usually the ruler was determined by very strict customs of descent through the eldest sons from the "original" ancestor. Often his rule was quite complete and almost always included property, earnings, and contract. This was entirely at the caprice of the patriarch, with the ruled having none of what we would think of as rights. But the patriarch did have a customary responsibility to provide for his family. And males having obtained the age of majority could free themselves from the rule of their father and even start their own patriarchy.

The Sovereign

Later there develops a sovereign ruling over a collection of families. This rule is in the style of the patriarch: he issues rulings after the fact and without reference to any established rules. Primitive man at this stage supposed that the gods (Themis to the Greeks) dictated to the king what to award. *Themistes* was the name for the awards. Note that these are not laws but judgments. By a pattern of *themistes*, a custom was created (as opposed to the theory that the laws embody the customs of a previous era).

Customary Law

Usually the initial kings were heroic, but often feebler monarchs followed. Often an oligarchy would grow up around the monarch. These aristocrats became the depository and administrators of the law. This was the epoch of customary law. English common law pretends to be of this type (at one time, the judges relied on rules, principles, and distinctions not fully known to lawyers or the public), but it is today based on written precedents.

A Legal Code

Finally a legal code is written down. This usually occurs just after the invention of writing. Often the initial code mixes civil, religious, and moral issues. But at last we have arrived at a stage where the legal system becomes regonizable. Usually the initial code retains the flavor of the earlier patriarchal era and primarily deals with relationships between families or between the patriarchs of the families.

In English history, this occurred in 800 when King Alfred the Great declared that the law would be written before the fact so that people could know what the law was. (I date the beginning of the Libertarian revolution from this point.)

Individuals

Next, the legal code begins to deal with individuals rather than just the patriarch. It even begins to regulate relations within the family.

Contractual Relationships

Finally, relationships within a legal system begin to be determined more by contracts than by the status of the actors. The most obvious is employment, which becomes a matter of contract between parties rather than master and slave. This process can be observed in historical times and is still proceeding today.

Ancient Legal Codes

One of the most important steps a society takes is reducing its legal structure to a written code. It provides three important protections to a society:

a) It reduces the likelihood and the magnitude of the excesses of the legal oligarchy.

b) It helps reduce the degradation of national traditions.

c) It reduces the likelihood of superstitious extension of the prohibitions in the original code.

(continued on page 8)

History of Legal Systems (from p. 7)

Methods of Legal Improvements

Western European civilization is a rare exception in the history of the world. Most societies have not had the objective of improving their legal system. Where societies have attempted to be progressive, social necessities and social opinion are usually ahead of the law. The happiness of the people depends on how quickly the gap is narrowed. The improvements usually come in three ways, and they usually develop in this order: First, legal fictions bridge over problems. Second, equity courts provide a means of relief. Third, legislation brings the law nearer the improved social opinion.

A legal fiction is an assumption that changes the operation of a law without changing the letter of the law. For example, an adoption allows a family tie to be created even though the child was not born into the family.

Equity courts' reason for existence is that they supersede civil law on the grounds of superior sanctity, often expressed as providing more just decisions.

Legislation includes any agency for changing the code, from rulings by a despot to representative assembly deliberations.

Two of these steps, legal fictions and equity courts, need more explanation.

Legal Fictions

Legal fictions usually come into being when a change is needed but no one wants to appear to be making changes. In the English common law system, before a decision is reached the theory is that any case can be decided on existing precedents, but after the decision is handed down, this case affects all future cases that are similar. The Roman Responsa Prudentum operated in a similar manner, except for three details of procedure: the proceedngs could consider hypothetical cases; decisions were made by lawyers rather than judges; and entry to the bar (and therefore to the ability to render decisions) was open to anyone.

Equity Courts and the Appearance of the Law of Nature

The equity court of England is the Court of Chancery. It received its guidance from Canon Law (religious), from Roman law, and from the mixture of jurisprudence and morals in the Low Countries. The equity court of Rome was the Jus Gentium. The need for this court grew from the presence of many foreigners and their subsequent legal needs. Rome was unwilling to allow them to use the system set up for Roman citizens. An alien could not use the normal Roman law courts or make contracts. The lawyers got around this by creating a new law: Jus Gentium. In theory this law was supposedly composed of those laws common to all nations (actually just the other Italian tribes, because that was all they knew at the time). It was not held in high regard at the time of its creation, but was forced by political and commercial necessity.

The theory of the Law of Nature came from Greece later; the Stoic philosophy was very popular among lawyers. This led to Prætors wanting their Edicts to restore an assumed natural law. Thus Jus Gentium gained respect. The Prætor was the supreme justice of Rome, but held office for only one year. The Prætors were drawn from lawyers or controlled by lawyers. At the beginning of his term, the new Prætor explained what he intended to do in an Edict; such an Edict was usually a minor modification of his predecessor's.

Law of Nature

The idea behind the Law of Nature confuses past and future. It implicitly assumes a past state of nature ruled by a natural law. It assumes society can change toward a perfect future — an idea picked up from Christianity. It has been very important to the evolution of thought. Roman lawyers worked to perfect the "elegance" of their law. But the Law of Nature has much influenced modern law. Even though France had a very confusing law, with different laws for different people and different laws for different jurisdictions, the Law of Nature provided a theory and an article of faith for lawyers.

Then in the middle of the 18th century there occurred the most important event in the evolution of the Law of Nature: the writings of Rousseau. He widely influenced many levels of people. Rousseau held, in the words of Sir Henry Maine, that "A perfect social order could be evolved from [a] natural state." Unfortunately, in disdaining the superstitions of the priests, the adherents of natural law "flung themselves headlong into a superstition of the lawyer." This led to many of the disappointments of the French Revolution: "its tendency is to become distinctly anarchical." It also gave birth to International Law and the Law of War. International Law came from the idea that nations are equal (even if one is overwhelmingly more powerful than the other).

Primitive Society and Ancient Law

Legal Writing

Much of legal writing has been a restatement of the Roman thesis of natural law. There are some exceptions: Montesquieu's *Esprit des Lois* stated that laws come from local circumstance, that the nature of man is entirely plastic. He underrates the stability of the race and the inherited qualities of individuals. He doesn't realize that, in Maine's words, "An approximation of truth may be all that is attainable with our present knowledge, but there is no reason for thinking that [truth] is so remote or (what is the same thing) that it requires so much future correction, as to [make our present knowledge] be entirely useless and uninstructive." Bentham held that societies modify laws for general expediency. Most legal theories have not examined antiquity; yet we have always had evidence of early social states from three sources: accounts by contemporaries of less advanced civilizations; records by primitive societies of their history; and ancient law texts. Today we would have to add archaeology and anthropology.

Patriarchy

From ancient law we get the Patriarchal Theory. In the earliest history of most societies the Father ruled the entire family. Earliest states dealt with families, not individuals. Adoption was used to include outsiders who wanted to join the society. When recruitment by adoption stopped and outsiders were still drawn to a society, the growth of aristocracy began. Although these societies were very restrictive, adult males were able to withdraw from the family. Lineage followed males only, as the Scottish clans still do. This implies reduced rights for women. But after the Law of Nature became fashionable in Rome, women began having equal rights. Dark ages reduced women's status again. Slavery also is illustrative of primitive legal thinking. Slaves were considered members of the family, because the slave was subject to the commands of the head of the family. By contrast, English common law (which came later) regarded slaves as chattel property.

(continued on page 9)

History of Legal Systems (from p. 8)

The Early History of Property

Because Roman law referred to certain ways of obtaining property as natural, people have assumed those were "natural" ways; but if we look further back we see a different pattern. Similar to other aspects of ancient law, property rights were held by family units. In India, villages (family groups) held property in common; in Russia, the serf communities held property in common.

Roman Property

Under Roman law, three elements were necessary for possession: occupancy, adverse possession (holding for exclusive use), and prescription (keeping over a period of time). Many legal systems divide property into classes, *e.g.*, land property (which for the Romans included slaves and work animals) versus other property; ownership of land was usually harder to transfer. Over time, easier methods of transfer are worked out. Sometimes there is a system of dual ownership. For instance, in Rome, both the landlord and the tenant had rights in the property. Under feudalism, both the lord and the liegeman had rights.

The Early History of Contract

The history of contract in other places is unknown. In Rome, the earliest contracts were in the form of conveyances of land. Gradually, they began to be different. Conveyances were given a new name. Contracts then developed into four types. The least formal — consensual — was much like ours. Δ

[1] Sir Henry Sumner Maine, *Ancient Law* (1861; Dorset Press, 1986).

Bobby Yates Emory has worked a career as a programmer and systems analyst at IBM. A longtime libertarian activist, he has run for offices from County Commissioner to U.S. Senator, and held political party offices from Precinct Chairman to Regional Representative to the National Committee.

FNF President Enters Local Political Contest

by Richard Hammer

I would like to report to readers of *Formulations* that in February I filed to run for Commissioner here in Orange County, North Carolina. I face no primary since I was the only Republican to file. In November I will contend with three Democrats, those who survive the Democratic primary in May, to fill three seats on the five-person Board.

It is an uphill contest. A local newspaper checked records going back to the 1930s and reported that no Republican has won in that time. The major demographic feature in Orange County is Chapel Hill, a liberal, university community of about 60,000. In the county, total population about 100,000, Democrats outnumber Republicans about 2.5 to 1. In the two most recent elections Democrats outpolled Republicans by more than 2 to 1.

While I am an outspoken libertarian, North Carolina election law has refused to acknowledge the Libertarian Party during most recent years. Wanting to be active in local politics, five years ago I switched my registration from Democrat to Republican when a local libertarian activist formed the Republican Liberty Caucus, and suggested that I get active in the local Republican Party. I followed this advice and soon made many Republican friends. I was asked to bid for County Commissioner in 1990 (I lost in the Republican primary by 24 votes) and was elected and re-elected Vice Chair of the Orange County GOP. About once a month I write a column, making some libertarian comment upon local politics, published in a local paper.

I have announced that in this race I will accept no campaign contributions, and will spend no money, save travel expenses to meetings and postage stamps to reply to questionnaires. I have used the slogan "Government is a bad drug," saying too many people are hooked, and the local press has given me favorable coverage, echoing (for free!) my slogan a few times. Thus my campaign will have an unusual style. But I believe for me it will feel right.

My campaign for public office will have no connection with the work of the Free Nation Foundation, except of course within me: these are two separate efforts to advance the same philosophy. Local friends know about my work in the Free Nation Foundation. Indeed, the earliest and some of the most enthusiastic support for this project has come from local Republicans.

I filed for the office only a few minutes before the closing deadline. Two factors motivated me: 1) No moderate or non-socialist candidates had entered the race. It looked like all my friends (conservative Democrats, Republicans, Libertarians, and members of landowners' and taxpayers' associations) would have no one for whom to vote. 2) Politics is in my blood. I enjoy it. Δ

Dialogue

Restitutive Justice and the Costs of Restraint

by Richard Hammer and Roderick Long

Richard Hammer: Roderick Long has got me thinking with his article "Punishment *vs.* Restitution: A Formulation" (last issue). I like the position he takes, that coercion is justified for defense but not for retaliation. It has a kind face. And perhaps it is plausible. But it differs from the values I have assimilated growing up in America. So I need to wrestle with its implications.

I imagine that a framework such as Roderick suggests might work if implemented completely, or almost completely. In such a society citizens could feel confidence in their mechanisms of defensive coercion, and would not fear that a criminal who represented a continuing threat would roam free. Citizens could comfortably discard their impulses to retaliatory coercion, because effective defensive coercion would be no further than a phone call away.

But (I am trying to justify all the times I have cheered in movies when good guys blew away bad guys) suppose I find myself living in a society with malfunctioning mechanisms of defensive coercion. In such a society criminals, if not punished in the moment when retaliation might be possible, may return to inflict harm on another day. Then is retaliatory coercion justified?

Also, I wonder about the economics of all this. For starters, I think an effective system of law enforcement should pay for itself. People naturally want to economize, so a system may fail if desirable behaviors cost more than undesirable behaviors. Suppose a citizen has to choose between restraining

(continued on page 11)

The Nature of Law
Part I: Law and Order Without Government

by Roderick T. Long

Most people take the terms *order, law,* and *government* to be coextensive. Without government, there would be no law. Without law, there would be no social order. In fact, however, the three concepts are distinct.

Law may be defined as *that institution or set of institutions in a given society that adjudicates conflicting claims and secures compliance in a formal, systematic, and orderly way.* Law thus defined is one species of social order, but not the whole of it; there are also less formal mechanisms for maintaining social order. Indeed, the vast bulk of cooperation in society in fact depends on informal order rather than on law.

Varieties of Law

Law may be subdivided into *voluntary* and *coercive* law, depending on the means whereby compliance is secured. Voluntary law, as the name implies, relies solely on voluntary means, such as social pressure, boycotts, and the like, in order to secure compliance with the results of adjudication. Coercive law, on the other hand, relies at least in part on force and threats of force.

Coercive law in turn may be further subdivided into *monocentric* and *polycentric* coercive law. Under monocentric coercive law, there is a single institution that claims, and in large part achieves, a coercive *monopoly* on the use of force to adjudicate claims and secure compliance in a given territorial area. This institution is called a *government,* and everyone other than the government and its agents is forbidden to adjudicate by force. Under polycentric law, by contrast, no one agency claims or possesses such a monopoly.

An *anarchist,* then, is not someone who

Roderick Long

rejects order or law or even coercive law, but rather one who rejects government. The anarchist argues that informal order, voluntary law, and polycentric coercive law are sufficient to maintain social cooperation; the advocate of government argues that monocentric coercive law is needed in addition, and indeed typically maintains that the amount of social order that can be maintained through non-governmental sources alone is quite small.

Yet a great deal of social order is maintained through informal means alone. In *Order Without Law: How Neighbors Settle Disputes,* economist Robert Ellickson has shown how disputes over land use are frequently resolved informally, without recourse to official adjudication, and certainly without recourse to legal statutes (the relevant statutes being generally unknown to the disputing parties in any case). More broadly, Robert Axelrod in *The Evolution of Cooperation* has explained why cooperation is generally a successful strategy and thus why it tends to be "selected for" by the market, as cooperative relationships emerge and grow spontaneously without being directed by any authority.

When there *is* a need for the more formal mechanism of law, this law may be voluntary rather than coercive. An example of voluntary law is the Law Merchant, a system of commercial law that emerged in the late Middle Ages in response to the need for a common set of standards to govern international trade. The merchants, fed up with the excessive rigidity of governmental laws regulating commerce, and frustrated by the lack of uniformity among the commercial codes of different nations, simply formed their own Europe-wide system of courts and legal codes. For enforcement, the Law Merchant relied not on state-imposed penalties but on credit reports; those who refused to abide by the system's rules and decisions would have a hard time finding other merchants willing to deal with them. (The case of the Law Merchant shows that systems of private law need not depend on kinship or other local ties for their success.)

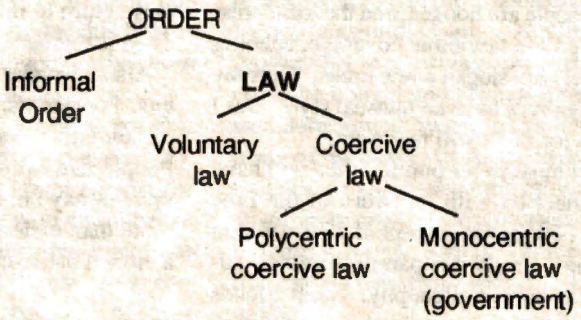
When law *is* coercive, it need not be monocentric. For example, under early Anglo-Saxon law, Kings made foreign policy only; domestic policy was left to local courts called Moots, which simply enforced agreed-upon local customs. Neither Kings nor Moots had any power of domestic enforcement; it was up to individuals to enforce the law by private coercion. Such individuals generally formed associations called *borhs,* pledging security for one another's reliability; even here, much enforcement was through social sanction (being denied membership in a *borh*) rather than coercion.

Public Goods *vs.* Public Choice

Thus private law, whether strictly voluntary or also coercive, has proven itself historically as an effective provider of social order. But the anarchist's point is not simply that monocentric law is not *necessary* in order to maintain social order, but more fundamentally that introducing monocentrism into the picture actually *decreases* social order.

Advocates of government assume that non-governmental mechanisms for achieving order will be ineffective because of *public-goods* problems — specifically, the problem that unless people are *forced* to cooperate, each person will have an incentive to free-ride on the cooperation of others without cooperating himself. This argument is often taken to show the necessity of government.

But if market solutions are beset by perverse incentives caused by public-goods



(continued on page 11)

Nature of Law (from p. 10)

problems, governmental solutions are likewise beset by perverse incentives caused by *public-choice* problems: monopolies that collect revenues by force are not accountable to their clients, and state officials need not bear the financial cost of their decisions; inefficiency is the inevitable result. Since *both* systems involve perverse incentives, the important question is: which system is better at *overcoming* such incentives?

And here the answer is clear. Under a market system, entrepreneurs stand to reap financial rewards by figuring out ways to supply "public" goods while excluding free riders. Thus the system that creates the perverse incentives also creates the very incentives to overcome them. That's why every so-called "public" good has been supplied privately at one time or another in history. Governments, by contrast, must *by definition* forbid competition. Thus governments, unlike markets, have no way of solving their incentive problems. We would be well-advised, then, to buy our law on the market rather than from the state. ∆

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Restitutive Justice (from p. 9)

a threat, for the cost of $100/day, or shooting a threat, for a one-time cost of $1. These incentives alone do not encourage the behavior we might desire.

Also, we have to expect that criminals perform their own sorts of cost-benefit studies. No doubt they balance the prospect of success with the cost and probability of getting caught. Ideally, if defensive coercion worked perfectly, then no criminal would ever succeed, and criminals would stop trying because their attempts would be wasting their efforts. But, because of the law of diminishing returns, this ideal state may never be reached. A 100% perfect defense may cost ten times as much as a 99% perfect defense. So we can expect some buyers of protection to balk at buying the last 1%, and the free-market equilibrium may be a state in which some crime always pays.

If there is a science of economic calculation of crime control, I expect that this science could show how a system of private law could work. And I expect this science could also show that most familiar failures in crime control are tragedy-of-the-commons failures; government acts invariably create, or codify, public spaces in which certain acts of cheating will be rewarded.

Roderick Long: Rich Hammer raises the following questions about my article: if defensive coercion is justified but retaliatory coercion is not, what happens when a) defensive coercion is much more expensive than retaliatory coercion, or b) a given society's mechanisms of defensive coercion are simply not functioning very well? Under such circumstances, are people still morally required to refrain from retaliatory coercion? And whatever morality may require, isn't it simply realistic to suppose that under such circumstances any private legal system is going to engage in retaliatory coercion as a matter of economic necessity?

These are good questions. Let me deal with the moral issue first. My brief answer here is that whether a given coercive response counts as defensive or as retaliatory may depend on precisely such circumstances as those that Rich mentions.

In my article I defined retaliatory coercion as coercion that exceeds the extent *necessary* to defend against an aggressor. Suppose I attack you. If there are no police, or if the police are unable or unwilling to defend you, then a coercive action on your part (*e.g.*, killing me) that would ordinarily not be necessary has become necessary — and thus what *would* have been retaliatory coercion is now merely defensive. Similar remarks apply to the issue of expense: if you have to spend an unreasonable amount of money to restrain me from attacking you, then I am in effect depriving you of your money through my aggressive coercion, and if the cost to you is great enough then you may become justified in killing me in order to defend your property. (The cut-off point is the point at which the cost to you is so great that a defensive killing ceases to be morally disproportionate to the aggression.)

But if some alternative, *low-cost* means of restraint were available, then you would not be justified in killing me — for then such a killing would no longer be *necessary* for defensive purposes. And this is where the economic issue comes in also. Under a private legal system, there would presumably be prisoner's-rights advocacy groups, just as there are today. Organizations opposing the death penalty, such as Amnesty International, the Libertarian Party, or the ACLU, could raise money to fund prisons; this would free private protection agencies of the costs of restraint, thus removing both the incentive to kill and any plausible legitimacy to killing. (And frankly, I'd rather live in a prison run by Amnesty International than one run by a for-profit protection agency!) ∆

FNF Director Lectures (from p. 1)

corporate the insights of the ancient Greek philosopher Aristotle. Discussion was lively.

On July 30, Dr. Long gave a talk on "Consequentialist vs. Deontological Libertarianism: What Is and What Isn't at Stake" to an audience at the Institute for Humane Studies at George Mason University, Fairfax, Virginia. Dr. Long distinguished between arguments for liberty based on individual rights, and arguments for liberty based on social welfare; he argued that although the argument from rights explains *why* libertarianism is correct, the argument from social welfare is also needed in order to justify the belief *that* libertarianism is correct.

On November 13, Dr. Long lectured on the subjects of "Rights and Liberty" and "The Ethics of Redistribution" at an Institute for Humane Studies Conference on Classical Liberalism and Contemporary Issues, Warrenton, Virginia. Dr. Long argued that property rights are an extension of our rights to control our own bodies, and distinguished between permissible (restitutive) and impermissible (aggressive) grounds for redistribution. Discussion focused on the problem of restitution to Native Americans.

As this issue goes to print, Dr. Long is preparing to give a talk on "Immanent Liberalism" at a Social Philosophy and Policy Conference on the Just Society, Bowling Green, Ohio, April 7-10. He plans to distinguish between two varieties of liberalism: a state-oriented version, that attempts to realize the liberal ideal of mutual consent *vicariously*, through the mechanism of democratic government, and a libertarian version, that attempts to realize that same ideal *immanently*, in day-to-day voluntary interactions in society. Dr. Long will argue that the tension between these two approaches may be found in both capitalist and socialist versions of liberalism. ∆

A University Built by the Invisible Hand

by Roderick T. Long

The history of the University of Bologna offers an example of how the spontaneous-order mechanisms underlying market anarchism — mechanisms like mutual-aid surety associations and competing legal jurisdictions — can operate in a university setting.

Many mediæval universities were run from the top down. The University of Paris, for example, was founded, organized, and funded by the government, and students were under the strict regulation and control of the faculty. But the University of Bologna was run from the bottom up — controlled by students and funded by students. As for its founding, nobody ever really *started* the University — it just sort of happened. The University of Bologna arose spontaneously, through the interactions of individuals who were trying to do something else.

In the 12th century, Bologna was a center of intellectual and cultural life. Students came to Bologna from all over Europe to study with prominent scholars. These individual professors were not originally organized into a university; each one operated freelance, offering courses on his own and charging whatever fees students were willing to pay. If a professor was a lousy teacher or charged too much, his students would switch to a different professor; professors had to compete for students, and would get paid only if students found their courses worth taking.

Bologna soon became crowded with foreign students. But being a foreigner in Bologna had its disadvantages; aliens were subject to various sorts of legal disabilities. For example, aliens were held responsible for the debts of their fellow countrymen; that is, if John, an English merchant, owed money to Giovanni, a Bolognese native, and John skipped town, then innocent bystander James, if James were an English citizen, could be required by Bolognese law to pay to Giovanni the money owed by John.

The foreign students therefore began to band together, for mutual insurance and protection, into associations called "nations," according to their various nationalities; one "nation" would be composed of all English students, another of all French students, and so on. If any student needed assistance (*e.g.*, in paying other people's debts as demanded by the government), the other members of his "nation" would chip in to help. Each was willing to pledge a contribution to the group for this purpose, in exchange for the assurance that he would himself be able to draw on these pooled resources in time of need.

In time the different "nations" found it useful to spread the risk still more widely by combining together into a larger organization called a *universitas*. This was not yet a university in the modern sense; the closest English equivalent to the Latin *universitas* is "corporation." The *universitas* was essentially a cooperative venture by students; the professors were not part of the *universitas*. The *universitas* was democratically governed; regular business was conducted by a representative council consisting of two members from each "nation," while important matters were decided by the majority vote of an assembly consisting of the entire membership of the *universitas*. (The similarity to the ancient Athenian constitution is striking.) The *universitas* adjudicated internal disputes and provided welfare relief to its members.

Once the *universitas* had been formed, the students now had available to them a means of effective collective bargaining with the city government (rather like a modern trades-union). The students were able to exercise considerable leverage in their disputes with the city because if the students decided to go on "strike" by leaving the city, the professors would follow their paying clients and the city would lose an important source of revenue. So the city gave in, recognized the rights of foreign students, and granted the *universitas* civil and criminal jurisdiction over its own members. Although the *universitas* was a purely private organization, it acquired the status of an independent legal system existing within, but not strictly subordinate to, the framework of city government.

How did the *universitas* of Bologna become the University of Bologna? Well, after all, this new means of effective bargaining with the city could also be used as a means of effective collective bargaining with the *professors*. The students, organized into a *universitas*, could control professors by boycotting classes and withholding fees. This gave the *universitas* the power to determine the length and subject-matter of courses, and the fees of professors. Soon professors found themselves being hired and fired by the *universitas* as a whole, rather than by its individual members acting independently. At this point we can finally translate *universitas* as "University."

As employees of the student-run University, professors could be fined if they didn't begin and end lectures on time, or if they didn't finish course material by the end of the course. A committee of students was assigned to keep an eye on the professors and to report any misbehavior; the members of this committee were officially called the Denouncers of Professors.

The professors were not completely powerless; they formed a collective-bargaining association of their own, the College of Teachers, and won the right to determine both examination fees and requirements for the degree. A balance of rights thus emerged through negotiation: the obligations of professors were determined by the students, while the obligations of students were determined by the professors. It was a power-sharing scheme; the students, however, continued to act as the dominant partner, since they were the paying clients and collectively carried more clout.

This quasi-anarchistic setup was eventually brought to an end when the city government took over and began paying professors directly from tax revenues, thus converting the University of Bologna into a publicly-funded institution. Whether we interpret this move as public-spirited altruism or as a cynical power grab, in either case the result was that professors became dependent on the city government rather than on the students, who lost their earlier leverage as power shifted from the student body to the Bolognese politicians. Δ

Principal source: Harold J. Berman. *Law and Revolution: The Formation of the Western Legal Tradition.* Harvard University Press, Cambridge, 1983.